UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-11968-GAO

MARY COATES, Individually and p.p.a LAUREN NICHOLSON,
Plaintiffs

v.

DUFFER'S GOLF CENTER, INC., JOHN DOE, ALIAS, JANE DOE, ALIAS, JOHN DOE CORPORATION, ALIAS,
Defendants

ORDER
May 2, 2007

O'TOOLE, D.J.

The plaintiffs have moved to disqualify one of the defense experts, Mary Armstrong, on the ground that she previously had been retained by them as an expert in this litigation. The plaintiffs contend that their counsel shared with Ms. Armstrong documents and confidential information regarding counsel's impressions and theories of the case. As a result, plaintiffs say that they would suffer undue prejudice if Ms. Armstrong were to be permitted to testify at trial for the defendants.

Almost universally, when courts are faced with such a situation of "side-switching" by one party's expert, they apply the test first articulated in Paul v. Rawlings Sporting Goods Co., 123 F.R.D. 271, 278 (S.D. Ohio 1988). See, e.g., Lacroix v. BIC Corp., 339 F. Supp. 2d 196 (D. Mass. 2004); City of Springfield v. Rexnord Corp., 111 F. Supp. 2d 71 (D. Mass. 2000); Wang Laboratories, Inc. v. Toshiba Corp., 762 F. Supp. 1246 (E.D. Va. 1991). Under that approach, the court must first determine "whether the attorney or client acted reasonably in assuming that a confidential or fiduciary relationship of some sort existed and, if so, whether the relationship

developed into a matter sufficiently substantial to make disqualification or some other judicial remedy appropriate." Paul, 123 F.R.D. at 278. As the Paul court itself explained, the test aims to first determine if a confidential relationship existed, and second, if in the course of the relationship, any confidential information was exchanged, defining confidential information as "of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the attorney-client privilege." Id. at 279. Unless both parts of the test were satisfied, disqualification would be unnecessary.

Under this rubric, I conclude that Ms. Armstrong should not be disqualified from testifying on behalf of the defendants. Although the plaintiffs entered into a formal contractual relationship with Ms. Armstrong and paid $1,650 for her services, those facts do not address the core aspect of the relationship relevant to the issue – the degree of confidentiality between the expert and the former party. To that end, there is very little support for the plaintiffs' proposition. According to the plaintiffs' own admissions, their relationship with Ms. Armstrong was very brief – consisting of only a few telephone conversations over the course of a few months. Counsel's affidavit does not establish that any information exchanged between the plaintiff and Ms. Armstrong was truly confidential in nature.

While some information was exchanged, that alone is insufficient to establish that significant or confidential disclosures were made. Hewlett-Packard Co. v. EMC Corp., 330 F. Supp. 2d 1087, 1094 (N.D. Cal. 2004) ("Similarly, a confidential relationship is not necessarily established just because some information concerning the litigation is shared." (citing Larson v. Rourick, 284 F. Supp. 2d 1155, 1158 (N.D. Iowa 2003)). Although plaintiff's counsel attests in general terms that litigation strategies, merits of the plaintiffs' case, and other strengths and weaknesses of the case were

discussed, Ms. Armstrong attests to the contrary. In the face of such conflicting versions, the plaintiffs, who bear the burden of demonstrating that a confidential relationship existed, offers no additional supporting details or specifics regarding the confidential information shared. Hewlett-Packard, 330 F. Supp. 2d at 1093. As another example of the meager support for the claim that confidential information was exchanged, counsel stated that it provided Ms. Armstrong with "a packet of materials, which included depositions, answers to interrogatories, responses to requests for production, photographs, and case information," yet provided no further details as to what, if any, confidential information was encompassed by the vague phrase "case information." (Pls.' Mem. in Supp. of Mot. to Disqualify Mary B. Armstrong from Testifying as an Expert for Def. 4). Without more, the plaintiffs have failed to satisfy her burden. Finally, it is clear that plaintiffs' counsel functionally terminated their relationship with Ms. Armstrong when he decided against calling her as an expert at trial, something that happened well before she was contacted by the defendants.

Having found neither a confidential relationship nor the exchange of confidential information between plaintiffs' counsel and Ms. Armstrong, I do not find adequate grounds for disqualification and therefore DENY the plaintiff's motion (dkt. no. 55).

It is SO ORDERED.

May 2, 2007
DATE

/s/ George A. O'Toole, Jr.
DISTRICT JUDGE